No. 89-1708

In the Supreme Court of the United States

OCTOBER TERM, 1989

JAMES T. KOUNO

Petitioner,

v.

OREGON STATE BOARD OF HIGHER EDUCATION, KENNETH L. BEALS, COURTLAND L. SMITH, LYLE D. CALVIN, JOHN V. BYRNE, TOM E. GRIGSBY, and LLOYD E. CRISP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the eleventh amendment bars petitioner's suit against the Oregon State Board of Higher Education, and against the individual academic employees named in petitioner's complaint, when: (1) the suit is based solely on state law claims; and (2) the suit is related only to the individual respondents' actions as members of the university faculty "in academic/educational transactions," (Pet. Cert. at 20).

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents accept, as adequate for review, petitioner's reference to the opinions below and his statement of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions petitioner quotes, the following provisions of Oregon Revised Statutes are pertinent.

Or. Rev. Stat. § 351.010 provides:

> The Department of Higher Education shall be conducted under the control of a board of 11 directors, to be known as the State Board of Higher Education. Two shall be students admitted at different public institutions of higher education in Oregon at the time of their appointment.

Or. Rev. Stat. § 351.070(1)(a), (2)(e), (3) provides:

> (1) The State Board of Higher Education may, for each institution under its control:
>
> (a) Appoint and employ a president and the requisite number of professors, teachers and employees, and prescribe their compensation and tenure of office or employment.
>
> (2) Subject to such delegation as the state board may decide to make to the institutions, divisions and departments under its control, the State Board of Higher Education may, for each institution, division and department under its control:
>
> . . . .
>
> (e) Pursuant to the procedures described in ORS 351.065, adopt rules relating to the use of and access to student records of the institutions including the

opportunity to challenge inaccurate information placed in student records. However, except for directory information, records containing information kept by the institution, division or department concerning a student and furnished by the student or by the institution, division or department, including, but not limited to, information concerning discipline, counseling, membership activity, academic performance or other personal matters, shall not be available to public inspection or disclosure for any purpose except with the written consent of the student who is the subject of the record or upon order of a court of competent jurisdiction or, in an emergency, to appropriate persons if such information is necessary to protect the health or safety of the student or other persons. Nothing contained in this paragraph prohibits authorization of the inspection of such records by institution officials or employees who have a legitimate educational interest in inspecting student records, or by any representative of a state or federal governmental agency that is required by law to inspect student records. Rules may be adopted permitting release of personally identifiable information in connection with financial aid for which a student has applied or which a student has received. Directory information shall be defined by rules adopted by the State Board of Higher Education.

. . . .

(4) As used in subsection (2) of this section, "legitimate educational interest" means the demonstrated need to know by those officials of an institution who act in the student's educational interest, including faculty, administration, clerical and professional employees, and persons who manage student record information.

Or. Rev. Stat. § 351.072(1)(a) provides:

(1) Notwithstanding ORS 183.310 to 183.550, the following actions may be taken by the State Board of

Higher Education or the educational institutions under its control without compliance with the rulemaking provisions of ORS 183.310 to 183.550:

(a) Adoption of standards, regulations, policies or practices by any of the educational institutions under the control of the State Board of Higher Education relating primarily to admissions, academic advancement, classroom grading policy, the granting of academic credits, granting of degrees, scholarships and similar academic matters.

Or. Rev. Stat. § 352.002 provides:

The State System of Higher Education consists of the programs, activities and institutions of higher education under the jurisdiction of the State Board of Higher Education including the following:

(1) The University of Oregon.

(2) Oregon State University.

(3) Portland State University.

(4) Oregon Health Sciences University.

(5) Oregon Institute of Technology.

(6) Western Oregon State College.

(7) Southern Oregon State College.

(8) Eastern Oregon State College.

Or. Rev. Stat. § 352.004 provides:

The president of each university and college is also president of the faculty. The president is also the executive and governing officer of the school, except as otherwise provided by statute. Subject to the supervision of the board, the president of the university has authority to control and give general directions to the practical affairs of the school.

Or. Rev. Stat. § 30.285 provides:

(1) The governing body of any public body shall defend, save harmless and indemnify any of its

officers, employees and agents, whether elective or appointive, against any tort claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring in the performance of duty.

(2) The provisions of subsection (1) of this section do not apply in case of malfeasance in office or wilful or wanton neglect of duty.

(3) If any civil action, suit or proceeding is brought against any state officer, employee or agent which on its face falls within the provisions of subsection (1) of this section, or which the state officer, employee or agent asserts to be based in fact upon an alleged act or omission in the performance of duty, the state officer, employee or agent may, after consulting with the Department of General Services file a written request for counsel with the Attorney General. The Attorney General shall thereupon appear and defend the officer, employee or agent unless after investigation the Attorney General finds that the claim or demand does not arise out of an alleged act or omission occurring in the performance of duty, or that the act or omission complained of amounted to malfeasance in office or wilful or wanton neglect of duty, in which case the Attorney General shall reject defense of the claim.

STATEMENT OF THE CASE

Petitioner Kouno, a Japanese citizen, brought suit in federal district court against the Oregon State Board of Higher Education and six named persons. The following summary of the facts is taken solely from the petitioner's third amended complaint. That complaint recites that the six individuals are sued "in their individual capacity and in their capacity representing OSU as an educational institution." (Complaint, Pet. Cert. at 57). Respondent Byrne is the president of Oregon State University. Respondent Calvin is the dean of the university graduate school. Respondent Smith is the chair of the anthropology department at Oregon

State University. Respondent Beals represented the anthropology department on petitioner's graduate thesis advisory committee; he was the chair of the committee and he served as petitioner's thesis advisor. Respondents Grigsby and Crisp are faculty members who sat on a university grievance committee that heard petitioner's appeal from his dismissal from the graduate school. Petitioner was a graduate student pursuing a master's degree in an interdisciplinary studies program at Oregon State University. (Complaint, Pet. Cert. at 57-69).

According to petitioner's complaint, respondent Beals resigned as petitioner's thesis advisor, and Beals wrote a letter regarding his resignation that was sent to faculty members in the anthropology department. (Complaint, Pet. Cert. at 63). Petitioner alleges that the letter contained false statements about his academic efforts, that the circulation of the letter violated state law regarding the confidentiality of student academic records, and that it embarrassed him. (Complaint, Pet. Cert. at 63-68).

According to the complaint, Beals falsely told petitioner that he could receive a degree "by resolution, without regard to [his] thesis work." (Complaint, Pet. Cert. at 68). Smith, the chair of the anthropology department, then told petitioner that he would have to agree with this resolution, and that the department could not offer petitioner further help with his research because "its faculty, including Beals, lacked knowledge in Kouno's research topic." (Complaint, Pet. Cert. at 64). Smith "demanded" that petitioner move out of his department office. (Complaint, Pet. Cert. at 69).

Calvin, the dean of the graduate school, later dismissed petitioner from the school. Calvin told petitioner that his "thesis effort was unsatisfactory." (Complaint, Pet. Cert. at 71).

"Pursuant to OSU rules," petitioner appealed Calvin's decision to a university grievance committee consisting of

respondents Grigsby and Crisp and a student, who is not named in the complaint. (Complaint, Pet. Cert. at 61). The committee "upheld" Calvin's decision to dismiss petitioner from the graduate school, allegedly "without asserting any academic or disciplinary ground." (Complaint, Pet. Cert. at 61).

Again, "pursuant to OSU rules," petitioner appealed his dismissal to respondent Byrne, the university president. (Complaint, Pet. Cert. at 61). "Byrne upheld Calvin without grounds which Byrne could, in good faith, view as valid." (Complaint, Pet. Cert. at 75).

Petitioner sued for breach of contract, outrageous conduct, invasion of privacy, libel, fraud, and conspiracy. His third amended complaint presented only state law claims; no constitutional claims were pled. (Opinion, Pet. Cert. at 51). He sought his reinstatement in the graduate program and the formation of a new thesis committee. He also sought damages from Beals, Smith, Calvin, Grigsby, Crisp and Byrne.

The district court granted the respondents' motion to dismiss the action for lack of subject matter jurisdiction. The district court concluded that "all [petitioner's] claims derive exclusively from [his] academic performance and the faculty's response to it." and that "the state is the real party in interest." (Opinion, Pet. Cert. at 55). The Ninth Circuit affirmed.[1]

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[1] In his petition, Kouno candidly acknowledges that his appeal from the district court judgment was "not necessarily timely." (Pet. Cert. at 26). Petitioner filed his appeal more than 30 days after the entry of the judgment. Thus, his appeal from that judgment was timely only if he filed a motion that tolls the time for appeal.

After the entry of the judgment, plaintiff did file what he termed a Rule 52(b) motion for reconsideration. Such a motion tolls the time for appeal, Fed. R. App. P. 4(a)(4)(iii), but the motion applies only to an action "tried upon the facts," and not to one dismissed for lack of subject matter jurisdiction, as this case was. Fed. R. Civ. P. 52(a). The district court treated petitioner's post-judgment motion as a Rule 60(b) motion for relief from the

(Footnote continued on next page)

REASONS FOR DENYING CERTIORARI

Kouno's petition raises six issues. He contends that his suit is not one brought against the state and that it is not barred by the eleventh amendment. As an adjunct to this contention, he asserts that the fact that the state would indemnify the individual respondents for any damages awarded against them does not implicate the eleventh amendment or convert this action into one brought against the state. He contends that the district court misread his complaint, and that the court relied upon facts which are not apparent from the complaint, and which petitioner disputes. Finally, he argues that, to the extent that they are inconsistent with his contentions, *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978); *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), and *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), should be overruled or clarified.

This response will discuss each issue, but not separately. The response will first consider the eleventh amendment issues, including petitioner's request that some of this Court's earlier decisions should be reexamined, and then the response will turn to petitioner's assertions that the district court misread his complaint.

I. The Eleventh Amendment Bars this Action.

The eleventh amendment bars a federal court suit "in which the State or one of its agencies or departments is named

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judgment, and denied it. Petitioner filed a timely appeal from this order; however, a Rule 60(b) motion does not extend the time for appeal from the underlying judgment.

The state argued below that only the denial of petitioner's Rule 60(b) motion was properly before the circuit court of appeals because petitioner had not filed a timely appeal from the judgment and the Rule 60(b) motion did not extend the time for appeal from the judgment itself. Nonetheless, the ninth circuit reviewed and affirmed the district court judgment. (Memorandum, Pet. Cert. at 47).

as the defendant." *Pennhurst State School & Hosp. v. Halderman, supra*, 465 U.S. at 100. One of the defendants in this case is the Oregon State Board of Higher Education. The Oregon Supreme Court has held, as a matter of state law, that an action brought against the State Board of Higher Education is in reality one brought against the state. *James & Yost, Inc. v. State Bd. of Higher Educ.*, 216 Or. 598, 340 P.2d 577 (1959).

When, as here, the only issues presented are ones of state law, then irrespective of the nature of the relief that is sought "[t]he Eleventh Amendment [also] bars a suit against state officials when 'the state is the real, substantial party in interest.' *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945)." *Pennhurst State School & Hosp. v. Halderman, supra*, 465 U.S. at 101. In determining whether a suit ostensibly brought against an individual state official is in actuality one brought against the state,

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' " *Dugan v. Rank*, 372 US 609, 620 (1963) (citations omitted).

Pennhurst State School & Hosp. v. Halderman, supra, 465 U.S. at 101, n. 11.

In this case, all aspects of this test are met. A judgment for petitioner would interfere with the administration of a state university; it would compel the university to act; and it would be paid from the public treasury.

The individual respondents are academic officers and faculty members of Oregon State University. They are employees of the state. Or. Rev. Stat. § 351.070(1)(a). Petitioner acknowledges that "[i]n all incidences recounted in the com-

plaint, the defendant teachers acted in their capacity as [petitioner's] teacher[s] performing the substance of their academic conduct with him." (Complaint, Pet. Cert. at 32). Part of the relief that petitioner seeks in his complaint is his reinstatement in the university graduate program from which he was dismissed, and the formation of a new thesis advisory committee. This relief, if granted, would compel the state to act, it would significantly interfere with the academic administration of this state university, and it would impinge upon "the prerogatives of state . . . educational institutions and [upon the courts'] responsibility to safeguard their academic freedom." *Regents of University of Michigan v. Ewing*, *supra*, 474 U.S. at 226.

An award of monetary damages against the individual defendants, based on their conduct in supervising and evaluating petitioner's performance as a graduate student, also would threaten academic freedom and hamper the university's administration of its academic affairs.

> If a "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," *Bishop v. Wood*, 426 U.S. 341, 349 . . . (1976), far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Board of Curators, Univ. of Mo. v. Horowitz*, [*supra*] 435 U.S. at 89-90.

Regents of University of Michigan v. Ewing, *supra*, 474 U.S. at 226.

Although petitioner argues, unpersuasively, that *Horowitz* and *Ewing* should be overruled or "clarified," much of his

argument is in fact premised upon similar decisions that also stress the principle of academic freedom. As the district court judge noted,

> [Petitioner] cites *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), which concerned the legislative limits of inquiry regarding a state university faculty member who refused to answer certain questions regarding political affiliations. He cites a similar case, *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), which concerned teacher loyalty oaths. He cites *Epperson v. Arkansas*, 393 U.S. 97 (1968), which concerned the constitutionality of a statute prohibiting the teaching of evolution. Finally, he cites *Board of Curators v. Horowitz*, [*supra*], which concerned the adequacy of constitutional due process in an academic setting when a student is terminated from a program. These cases stand for certain legislative restrictions or constitutional imperatives in the academic arena. They do not, as [petitioner] suggests, stand for the proposition that faculty members are not agents of the state.

(Opinion, Pet. Cert. at 53-54).

Petitioner's argument appears to be based upon a misunderstanding of *Keyishian v. Board of Regents*, *supra*, and of the other cases upon which he relies. He appears to reason that, if the state and the judiciary may not impinge upon certain areas of academic freedom, an academician must act solely as an individual within those areas and not as an agent of the state. This is the apparent import of assertions such as that a state university professor is an agent of the state "only when the teacher is essentially a passive victim in a circumstance in which the government has affirmatively placed him," but not in "the teacher's academic relationship with his student." (Pet. Cert. at 30).

One major flaw in this argument is that, in the guise of protecting academic freedom, it would seek to reduce that very

freedom. Academic freedom is not the freedom to be sued; and although state control of state universities is subject to constitutional limitations, nonetheless " '[b]y and large, public education in our Nation is committed to the control of state and local authorities.' *Epperson v. Arkansas*, [*supra*]." *Board of Curators, Univ. of Mo. v. Horowitz*, *supra*, 435 U.S. at 91.

In sum, the real party in interest here is the state. As the district court found, "the individual defendants [are] nominal defendants only [who] acted as agents of the state." (Complaint, Pet. Cert. at 55). In holding that state officials are not "persons" within the meaning of 42 U.S.C. § 1983, this Court recently observed that,

> [A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon v. Holt*, 469 U.S. 464, 471 . . . (1985). As such, it is no different from a suit against the State itself. See, *e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 165-166 . . . (1985); *Monell* [*v. New York City Dept. of Social Services*, 436 U.S. 658] *supra*, at 690, n. 55 . . . [(1978)].

Will v. Michigan Dept. of State Police, 491 U.S. ___, 109 S.Ct. 2304, 2311 (1989).[2] This suit also is no different from a suit against the state.

Petitioner asserts that the district and circuit courts have held that his suit is barred by the eleventh amendment solely because the state would pay any damages that might be awarded against the individual respondents in this case. Or. Rev. Stat. § 30.285(1). (Pet. Cert. at 35-36). Petitioner misinterprets the lower court decisions and the argument respondents made below. Respondents have not argued, and

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[2] Petitioner argues that *Pennhurst State School & Hosp. v. Halderman*, *supra*, should be overruled or limited. He presents no persuasive reason for reexamining *Pennhurst*, a decision relied upon in this Court's 1989 decision in *Will*.

the lower courts have not held, that the state is the real party in interest here solely because the state would indemnify the individual respondents for any damages awarded against them. Whatever the merits of such an argument may be, *see Davis v. Harris*, 570 F. Supp. 1136, 1139 (D. Or. (1983), *Hallmark Clinic v. North Carolina Dept. of Human Res.*, 380 F. Supp 1153, 1159-60 (E.D. N.C. 1974), *aff'd* 519 F.2d 1315 (4th Cir. 1975), the state's (and, the state believes, the lower courts') point here is that the fact that the state would pay any damages awarded against these individuals is simply another, but not the sole, factor indicating that the state is in fact the real party in interest. The point is that any damages "will obviously not be paid out of the pocket[s]" of the individual defendants. *Edelman v. Jordan*, 415 U.S. 651, 664 (1974). *See also Cory v. White*, 457 U.S. 85, 90 (1982).

II. The District Court Correctly Dismissed the Complaint.

In his petition, Kouno asserts that the district court misinterpreted his complaint in certain respects, and that the court misapplied the standard for review of the sufficiency of a complaint.

Even if these assertions were correct, they would not establish that this case merits a grant of certiorari. At most, this case would then involve an incorrect application of a correct legal standard of review. The district court noted its obligation to "construe the allegations in the complaint most favorably to the pleader," and to dismiss only if "it appears beyond doubt that the plaintiff can prove no set of facts in suport [*sic*] of his claim which would entitle him to relief," *quoting* from *Conley v. Gibson*, 355 U.S. 41, 45-45 (1957). (Opinion, Pet. Cert. at 51). Plaintiff does not contend that the district court misstated these well-settled legal principles.

The district court also did not misapply these principles. Petitioner asserts that the district court found, contrary to the complaint, that petitioner's "academic performance was inadequate." (Pet. Cert. at 39). The district court, however, made no such finding. The court merely noted, accurately, that petitioner's claims all "derive[d] exclusively from his academic performance and the faculty's response to it." (Opinion, Pet. Cert. at 55).

Petitioner also contends that "the lower courts [found] that the thesis advising committee rejected [his] thesis effort and terminated him from the program. This finding has no support in the complaint." (Pet. Cert. at 37). The district court's opinion and the complaint concededly differ as to who told petitioner that his thesis was unsatisfactory. The district court did state that plaintiff's thesis was rejected *by the thesis committee.* (Opinion, Pet. Cert. at 50). In contrast, the complaint recites that *the dean of the graduate school* told petitioner that "progress in [his] thesis effort was unsatisfactory," (Complaint, Pet. Cert. at 71) and that the dean dismissed petitioner from the graduate school. (Complaint, Pet. Cert. at 61). This discrepancy, however, between the complaint's allegations and the district court's conclusions is legally insignificant and it does not merit this Court's review.

CONCLUSION

The petition for writ of certiorari fails to present the Court with any substantial basis why the case merits review. Petitioner's claims correctly were barred by the eleventh amendment, and petitioner has failed to suggest any persuasive reason for the Court to reexamine its settled eleventh amendment jurisprudence. Beyond that, petitioner merely invites the Court to make a fact-bound review of the sufficiency of his complaint on the basis of a legally insignifi-

cant factual discrepancy. This Court should decline that invitation, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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